No. 73-1256

Supreme Court of the United States

OCTOBER TERM, 1973

CONNELL CONSTRUCTION COMPANY, INC.,
Petitioner,

vs.

PLUMBERS AND STEAMFITTERS LOCAL UNION NO. 100 OF UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA, AFL-CIO,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT

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The opinions below, the basis of this Court's jurisdiction, and the statutory provisions involved are set out at pp. 1-3 and A1-D4 of the Petition.

QUESTIONS PRESENTED

1. Whether in this labor anti-trust case the court below was correct in affirming a judgment for the Union on the ground that on the record and pleadings here the Plaintiff-Company "made out no sufficient claim of conspiracy to get beyond the union's antitrust exemption," (Pet. App. B-25).

2. Whether the court below, having determined that regardless of the construction given to the proviso to § 8(e) of the National Labor Relations Act, the Plaintiff-Company could not make out its antitrust case, was correct in declining to pass on the validity of the Union's actions under that proviso.

3. Whether the court below was correct in holding that since the subject matter of this suit is regulated by the National Labor Relations Act, the Plaintiff-Company's claims under state antitrust laws are preempted.

ARGUMENT[1]

In this labor antitrust case, the court below concluded that "Connell [the plaintiff in the trial court] has made out no sufficient claim of conspiracy to get beyond the union's antitrust exemption," (Pet. App. B-25). The conclusion that Connell failed to prove its case followed a meticulous review of this Court's most recent relevant authorities (*Mine Workers* v. *Pennington*, 381 U.S. 657, *Meat Cutters* v. *Jewel Tea Co.*, 381 U.S. 676, and *Musicians* v. *Carroll*, 391 U.S. 99), all of which the Court of Appeals read so as to give Connell the widest latitude in its effort to establish a violation, (Pet. App. B-7-21).[2] There is no

[1] The Petition's Statement of the Case (Pet. 3-7) follows that of the Court of Appeals (Pet. App. B-2-4). We therefore do not restate the facts.

[2] In contrast, the dissent is a construct to which Judge Clark was "guided by [his] own reason," (Pet. App. B-56), and whose result was a rule which he reluctantly acknowledged "bears a superficial resemblance to *Duplex Printing Co.* v. *Deering*, 254 U.S. 443," (Pet. App. B-57 n. 11), even though, as he further acknowledged, that authority no longer has any vitality in the antitrust area.

conflict among the circuits; and, indeed, the result reached below is consistent with that reached in the only other case arising in a similar context, *Suburban Tile Center* v. *Rockford Building Trades Council*, 354 F.2d 1 (C.A. 7), *cert. denied* 384 U.S. 960. Finally, the Court of Appeals made it clear that its decision was predicated not only on Connell's failure to prove an antitrust violation, but also on its further failure to pursue the proper course open to it in this "patently • • • labor law, not an antitrust, controversy" (Pet. App. B-39), *viz.*, the filing of a charge with the National Labor Relations Board or of a suit in court predicated on § 303 of the Taft-Hartley Act. Thus, the decision below does not settle the question of whether the Union's actions challenged here were lawful, but only whether they were forbidden by the antitrust laws. This petition is, therefore, a last ditch attempt to retrieve a litigation error. It should be denied.

1 (a). The Court of Appeals read *Pennington* and *Jewel Tea* as stating the following two-fold test:

> "[W]herever the complaint alleges a conspiracy between labor and non-labor groups to injure the business of another non-labor group the [labor antitrust] exemption is not available. Justice White's opinion in *Jewel Tea* suggests that even where there is no allegation of conspiracy the union cannot claim exemption from the antitrust laws if the agreement it seeks does not encompass a 'legitimate union interest'." (Pet. App. B-21.)

So far as we are aware, no court has given those authorities a wider reach.

The Court of Appeals noted that in order to meet the

requirements of the first branch of the foregoing test, a plaintiff must "prove facts showing that the union conspired with certain business interests to create a monopoly for such business interests," (Pet. App. B-23). This Connell had failed to do:

> "The complaint of Connell in this case contains no allegation of this union's participation in a scheme or conspiracy with a non-labor group to create a monopoly for that non-labor group. In fact, Connell bases its claim on the ground that this contract simply restricts the way in which it is free to carry out its business.
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> "Such a conspiracy allegation is clearly not the kind which faced the Supreme Court in *Pennington* and the other antitrust conspiracy cases. The only non-labor group with which the union is alleged to have "conspired" is the very party who now tries to bring the antitrust suit alleging serious injury. This seems to be strong evidence that at least with regard to the contract with Connell, the union was acting in its own self-interest and that no monopoly was being formed with Connell, the only non-labor group with whom the union is alleged to have 'conspired.' • • • We are thus left with a situation quite similar to *Jewel Tea* in that, once the conspiracy to monopolize drops out, the only remaining claim of plaintiff is that the agreement interferes with his right to conduct his business as he wishes and that the contract requires him to forego certain methods of competition." (Pet. App. B-23-25.)

In short, the holding below is not that a claim such as that presented here can never result in union antitrust liability, but that Connell simply did not prove its case.

This Court does not sit to review judgments which turn on the particular facts and pleadings in a particular record.

(b). The Court of Appeals next considered the question:

> "Is the union in this case seeking an agreement involving a legitimate union interest? We feel it clearly is. • • • The Plumbers' union is simply seeking to eliminate competition based on differences in labor standards and wages." (Pet. App. B-28.)

As the court below appreciated, pursuit of that object has been recognized to be outside the prohibitions of the antitrust laws at least since *Apex Hosiery* v. *Leader*, 310 U.S. 469, 503-504. And the Union's method of seeking to protect that interest here was more direct than those sanctioned by this Court in *Jewel Tea* and *Musicians* v. *Carroll:*

> "In *Jewel Tea*, Justice White's group found that the hours of marketing meat—even pre-cut meat—was a legitimate concern for the butchers' union that allows restriction on use of a competitive device which is obviously only remotely related to a union's primary aim. The agreement the union sought from Connell, however, is directly related to work attainment, work preservation, and other labor standards which directly benefit the members of the union involved. Just as in *Jewel*, the aims of the union in *American Federation of Musicians* were not nearly as related to direct union benefit as are the terms sought from Connell; yet in each of those cases the Supreme Court found that the terms of the agreement sought were sufficiently related to the elimination of competition based on wage and standard differences that the antitrust exemption was available.

"Even if the anticompetitive aspects are weighed against the direct benefit as Justice White suggests they should be in his *Jewel Tea* opinion and *American Federation of Musicians* dissent, it would be difficult to find these goals illegitimate. First, it is clear that in section 8(e) Congress explicitly recognized the legitimacy of these restrictions on subcontractors wherever the general contractor had unionized employees of his own. The *anticompetitive* effect does not change that much where the general contractor has no employees of his own. Of course, the situation may differ when all general contractors have agreed. However, it still remains that the only anticompetitive aspect is that the unions have succeeded in eliminating that feature of competition based on lower standards or wages. There remain numerous other competitive devices." (Pet. App. B-31-32; emphasis in original.)

(c). The construction industry proviso to § 8(e) of the NLRA, referred to by the Court of Appeals in the foregoing passage, is relevant in two additional respects. First, the Union has contended throughout that its actions in this case are protected by that proviso. There is NLRB authority supporting that contention. See *Orange Belt District Council of Painters* v. *NLRB*, 328 F.2d 534 (C.A.D.C.);[3] *Los Angeles Building Trades Council (Church's Fried Chicken, Inc.)*, 183 NLRB No. 102, 74 LRRM 1669. And, if the Union is correct on this issue (which the court below did not decide), the antitrust conclusion that follows is that stated by the Seventh Circuit in *Suburban Tile Center, Inc., supra*, 354 F.2d at 3:

[3] The context in *Orange Belt* was parallel to that here. See the Board opinion on remand, 153 NLRB 1196, 1199, *enforced*, 365 F.2d 540 (C.A.D.C.).

"A construction subcontracting agreement has been held to be a mandatory subject of collective bargaining. *Orange Belt District Council of Painters No. 48, AFL-CIO* v. *N.L.R.B.*, 1964, 117 U.S.App.D.C. 233, 328 F.2d 534, 537; *Building and Construction Trades Council of San Bernardino & Riverside Counties* v. *N.L.R.B.*, 1964, 117 U.S.App.D.C. 239, 328 F.2d 540. Economic action to secure such agreements has been allowed. *Essex County and Vicinity District Council of Carpenters etc.* v. *N.L.R.B.*, 3 Cir., 1964, 332 F.2d 636, 641; *Construction, Production & Maintenance Laborers Union, Local 383, AFL-CIO* v. *N.L.R.B.*, 9 Cir., 1963, 323 F.2d 422, 425. In the face of these decisions, it would be unreasonable to hold that success in securing such an agreement constitutes a violation of the anti-trust laws."

Second, as the court below stated, if the Union is incorrect and if the § 8(e) proviso does not apply, "it would seem unquestionable that the union is committing an unfair labor practice under" Section 8(b)(4)(ii)(B), (Pet. App. B-42). Thus, the conclusion that Connell does not have an anti-trust remedy does not lead to the conclusion that it has no remedy at all. If there has been a wrong, the Company does have a right to a cease and desist order from the Board under § 8(b)(4), and a right to damages from the courts under § 303. As the Court of Appeals stated:

"[W]e have concluded that on the basis of the allegations presented in this suit, there is no cause of action for Connell in antitrust. As our opinion illustrates, we do not feel we have jurisdiction to directly decide the complex labor issues underlying this dispute. We feel that if Connell desires adjudication of these matters there are adequate methods for securing such a

determination without resorting to a possible warping of the antitrust laws." (Pet. App. B-47.)

Thus, the catastrophic consequences for employers which Petitioner and its *amici* predict from the result reached below are nothing more than an effort to contrive unwarranted importance to this case.[4]

2. What has been shown thus far demonstrates that the question emphasized in the petition is without substance. We now show that the remaining two questions asserted are equally insubstantial.

First, Connell requests this Court to treat with its contention that the proviso to § 8(e) of the NLRA does not protect union action to secure a subcontracting clause from an employer in the construction industry who does not himself employ the class of craftsmen that would be covered thereby. (Pet. 2, 20.) Since the scope of the proviso has no bearing on Connell's antitrust claim, the court below properly declined to reach out for that additional issue. (Pet. App. B-47.) Indeed, the Court of Appeals was scrupulous to distinguish between the anti-trust issues which were raised

[4] For that reason, the petition's attempt to r argue the *National Woodwork* case, 386 U.S. 612, is bootless. It is preposterous to assert that this Court there held "that a *primary* subcontracting clause *in a collective bargaining agreement* was protected by the proviso to Section 8(e)," (Pet. p. 16, emphasis in original.). Since the conduct in *National Woodwork* was primary, the proviso which protects secondary activity did not come into play. The further contention that if unions, acting alone, conduct secondary boycotts prohibited by labor law they "are not exempt from the Sherman Act" (Pet. p. 17), admittedly relies on *Duplex v. Deering*, 254 U.S. 433, which for antitrust purposes was overruled in *U.S. v. Hutcheson*, 312 U.S. 219.

by Connell's complaint, and to avoid the labor law issues which might have been raised in that complaint, but were not. (Pet. App. B-39-47.)

Second, Connell also argues that the Court of Appeals was wrong in refusing to consider its claims under state antitrust laws. (Pet. 17-18.) The court below stated:

> "After careful consideration, we hold that state antitrust laws cannot be applied to this activity because of preemption by federal law. We note here that Connell has argued that the federal antitrust statutes do not necessarily preempt application of state antitrust statutes. However, it is not the federal statutes pertaining to antitrust which we feel are controlling here. Rather, as we have previously pointed out, the dispute in this case is unquestionably a labor law issue. It is the body of federal labor law, primarily enunciated in the National Labor Relations Act, which we feel preempts the possible application of state antitrust remedies to this situation." (Pet. App. B-47.)

This holding is unquestionably correct under *Weber* v. *Anheuser-Busch*, 348 U.S. 464, which held an action under a state anti-trust law (*id.* at 472), to be preempted where the allegedly unlawful picketing was either protected or a violation of the secondary boycott or jurisdictional dispute

prohibitions of §§ 8(b)(4) and 303 of the NLRA. See also *Teamsters Union* v. *Oliver*, 358 U.S. 283, 297.[5]

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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[5] Petitioner attempts to inject into the case the question of whether a "most favored nations clause" violates the antitrust laws. (Pet. 8-10.) No such claim was made in the complaint or at trial, where Connell argued that the alleged antitrust violation resulted solely from the agreement sought by the Union under which Petitioner "would no longer do business with any plumber or mechanical firm which did not have a contract with Local 100." (Court of Appeals App. 48.) Its claim of an antitrust violation was thus based solely on the subcontracting agreement which it signed, and that agreement did not contain a "most favored nations clause." (Pet. App. D-1.)